Supreme Court, U.S.
FILED
AUG 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-194

In The

Supreme Court of the United States

October Term, 1990

INLAND-ROME, INC., formerly known as GEORGIA KRAFT COMPANY,

Petitioner,

v.

C. L. RHODES, JR., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

THOMAS R. BURNSIDE, JR.
(Counsel of Record)

JAMES B. WALL

BURNSIDE, WALL & DANIEL
Post Office Box 2125
Augusta, Georgia 30903
(404) 722-0768

KENNETH GOOLSBY
Post Office Box 981
Thomson, Georgia 30824
(404) 595-1220

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

OBJECTION TO JURISDICTION 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. THE CONTRACT DID NOT INVOLVE INTERSTATE COMMERCE 8

II. GEORGIA'S INTERLOCUTORY APPEAL STATUTE IS NOT PREEMPTED BY 9 U.S.C. Section 15 15

CONCLUSION 19

APPENDIX

ORDER OF SUPERIOR COURT OF GREENE COUNTY 1a

OPINION OF SUPREME COURT OF GEORGIA .. 7a

AFFIDAVIT OF F. J. REYNOLDS 13a

TABLE OF AUTHORITIES

Page

CASES:

ADC Construction Company v. McDaniel Grading, Inc., 177 Ga. App. 223, 338 S.E. 2d 733 (1985) 9, 10, 14

Brockett Pointe Shopping Center, Ltd. v. Development Contractors, Inc., 193 Ga. App. 854, 389 S.E.2d 374 (1989) 11

Brooks v. Missouri, 124 U.S. 394, 8 S.Ct. 443 (1988) 4

Burke County Public Schools v. Shaver, 303 N.C. 408, 279 S.E.2d 816 (1981) 12

Ex Parte Warren, 548 So.2d 157 (Ala. 1989) *cert. denied*, ___ U.S. ___, 110 S.Ct. 554 (1989) 12

Ex Parte Williams, 555 So.2d 146 (Ala. 1989) 12

Georgia Kraft Company v. Rhodes, 257 Ga. 469, 360 S.E.2d 595 (1987) 2, 3, 6, 13

Hilton Construction Company v. Barton Mechanical Contractors, Inc., 251 Ga. 701, 308 S.E.2d 830 (1983) 10

Metro Industrial Painting Corp. v. Terminal Construction Co., Inc., 287 F.2d 382, at 387 (2nd Cir. 1961), *cert. denied*, 368 U.S. 817, 82 S.Ct. 31 (1961) 11

McCormick-Morgan, Inc. v. Whitehead Electric Company, 179 Ga. App. 10, 345 S.E.2d 53 (1986) 10, 14

Paine, Webber, Jackson & Curtis, Inc. v. McNeal, 143 Ga. App. 579, 239 S.E.2d 401 (1977) 10, 14

Phillips Construction Co. v. Cowart Iron Works, Inc., 250 Ga. App. 488, 299 S.E.2d 538 (1983) 17

Prima Paint Corporation v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801 (1967) 8, 13

TABLE OF AUTHORITIES – Continued

Page

Rhodes v. Inland-Rome, 195 Ga. App. 39, 392 S.E.2d 270 (1989) 9, 14

Southland Corporation v. Keating, 465 U.S. 1, 13, 104 S.Ct. 852, 860 (1984) 8, 18

Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 109 S.Ct. 1248 (1989) 8, 15, 17

West Point Pepperell, Inc. v. Multi-Line Industries, Inc., 231 Ga. 329, 201 S.E.2d 452 (1973) 10

STATUTES:

9 U.S.C. Section 1 ..... 2, 3, 6, 8

9 U.S.C. Section 2 ..... 8, 16

9 U.S.C. Section 3 ..... 6, 16

9 U.S.C. Section 4 16

9 U.S.C. Section 15 ..... 3, 8

28 U.S.C. Section 1257(a) 2, 4

O.C.G.A. Section 5-6-34(b) 2, 3, 16

No. 90-194

In The

Supreme Court of the United States

October Term, 1990

INLAND-ROME, INC., formerly known as GEORGIA KRAFT COMPANY,

Petitioner,

v.

C. L. RHODES, JR., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Respondents, C.L. Rhodes, Jr., et al.,[1] respectfully request that the Petition for Writ of Certiorari filed on behalf of Inland-Rome, Inc., formerly known as Georgia Kraft Company, be denied. Petitioner seeks to reverse the decision of the Court of Appeals of the State of Georgia

[1] Respondents, C. L. Rhodes, Jr., individually, and in his representative capacity as executor of the estate of C. L. Rhodes, deceased, and in his representative capacity as executor of the estate of Cleo K. Rhodes, deceased; Jane C. Rhodes; Susan Rhodes Harris; C. L. Rhodes, III; and Boyd C. Rhodes, are all residents of Georgia and collectively are referred to herein as "the Rhodes."

entered on March 5, 1990, finding there was no evidence to authorize the application of the Federal Arbitration Act. Respondents respectfully submit that the contract does not involve interstate commerce and that this Petition should be denied.

OPINIONS BELOW

The order of the Superior Court of Greene County, Georgia (Duke, J.) granting Rhodes' motion for injunctive relief, and terminating the contract, entered on December 12, 1986, is reprinted in the appendix hereto, pp. 1a-6a, *infra*. This decision was appealed to the Georgia Supreme Court which affirmed the judgment by its opinion of October 7, 1987.

The opinion of the Georgia Supreme Court entered on October 7, 1987, is reported at 257 Ga. 469, 360 S.E.2d 595 (1987). It is reprinted in the appendix hereto, pp. 7a-12a, *infra*.

OBJECTION TO JURISDICTION

The Petitioner seeks to base the jurisdiction of this Court on 28 U.S.C. 1257(a), contending that the judgment of the Court of Appeals of Georgia for which review is sought draws in question the validity of a State statute, to-wit: O.C.G.A. Section 5-6-34(b), and that the Federal Arbitration Act, 9 U.S.C. Section 1, et seq., preempts the State statute. That contention is not well-founded and overlooks the fact that such claim was not made by the

Petitioner when it filed its application for writ of certiorari with the Georgia Supreme Court seeking a review of the decision of the Georgia Court of Appeals for which review is sought here. Also, no cross-appeal was filed by the Petitioner when the trial court granted its certificate for immediate review under O.C.G.A. Section 5-6-34(b). The contention made by Petitioner in this Court as to 9 U.S.C. Section 15 preempting O.C.G.A. Section 5-6-34(b) was never presented to the Supreme Court of Georgia. The Petitioner's contention that it has a right under the Federal Arbitration Act, 9 U.S.C. Section 1, et seq., to enforce a contractual right to arbitrate the disputes in this case is misplaced. The very contract upon which Petitioner's contractual right to arbitrate is alleged to have arisen was terminated by order of the Superior Court of Greene County, Georgia, entered December 12, 1986, (Appendix, pp. 1a-6a, *infra*), by reason of Petitioner's breach thereof. That decision was appealed by Petitioner to the Supreme Court of Georgia where it was affirmed (*Georgia Kraft Company v. Rhodes*, 257 Ga. 469, 360 S.E.2d 595) (Appendix, pp. 7a-12a, *infra*), on October 7, 1987. No petition for certiorari was made to the United States Supreme Court from that decision. No claim of right under the Arbitration Act was made either in the trial court or in the Supreme Court of Georgia until approximately one year subsequent to the opinion of the Georgia Supreme Court and pursuant to the terms of the contract itself all rights and privileges thereunder had thus been terminated. Petitioner's own breach had terminated its alleged contractual rights. The record fails to show a claim of right under the Constitution or any statute of the United States specially set up by the Petitioner at the

proper time as required for jurisdictional predicate in this Court pursuant to 28 U.S.C. 1257(a). It has long been held that "if the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive so far as the right of review here is concerned." *Brooks v. Missouri*, 124 U.S. 394, 8 S.Ct. 443 (1888).

For the reasons stated above this case does not come within the purview of any of the jurisdictional considerations of Rule 17 of this Court.

STATEMENT OF THE CASE

This case involves a claim for damages arising out of Georgia Kraft's breach of a timber purchase contract and related lease agreement. Prior to the filing of the instant action, the Rhodes initiated suit in the United States District Court for the Southern District of Georgia, alleging jurisdiction in Federal Court on the basis of diversity of citizenship. Georgia Kraft objected to diversity jurisdiction, filing its motion to dismiss, contending that although it was a Delaware corporation, it did not maintain a place of doing business in Delaware; that the majority of its business was carried on in Georgia; that it maintained its principal office and place of business in Georgia; that all corporate records, all income tax records, all company asset records, and all corporate administrative and financial records were kept in Georgia; that, although it operated paper mills in Alabama, the Alabama mill had a production capacity of less than one-third of the combined capacity of the Georgia mills; and

that all corporate activities, including those carried on in the State of Alabama, reported to corporate headquarters in Georgia.[2]

Although Inland-Rome characterizes itself as "a multi-state timber and paper company" (Petition, p. 4), the original party to this litigation and to the contract was Georgia Kraft Company,[3] a corporation headquartered in Georgia, which processed the timber in Georgia, which made payments from its corporate headquarters in Georgia, and which maintained its records in Georgia. (Nix deposition, pp. 4, 29; Kinne deposition, pp. 26-27). Further, the "audit" of the records referred to by Petitioner (Petition, p. 4) was performed in June, 1988, after Inland-Rome had acquired Georgia Kraft Company, after the records had been obtained from Georgia (Sullivan deposition, p. 18), and after the contract had been terminated.

The agreement was prepared in Georgia, executed in Georgia, and specifically provided that the contract and

---

[2] The affidavit of F. J. Reynolds filed in support of this motion, because of its length, has been reprinted in its entirety in the Appendix hereto, pp. 13a-17a, *infra*.

[3] Prior to January 1, 1988, Georgia Kraft Company was a corporation owned by Meade Corporation and Temple Industries. On or about January 1, 1988, fifty percent of the company was conveyed to the Meade Corporation, with the remainder of the assets still owned by Georgia Kraft Company which company merged into Temple Inland and Inland-Rome, Inc. was formed. (Kinne deposition, pp. 5-6). Since Georgia Kraft Company was the party to the contract in 1957 when it was executed and was the party who breached the contract and was initially named when this suit was filed in August, 1986, Petitioner will be referred to herein as Georgia Kraft Company.

was to be construed according to the laws of the State of Georgia (R-39).

On December 12, 1986, an order was entered on the Rhodes' prayer for injunctive relief granting a permanent injunction, enjoining Georgia Kraft "from hereafter exercising any rights or privileges of any kind or nature under said timber purchase contract or the related lease agreement." (R-172-178). Thereafter, on October 26, 1988, and on the eve of trial, Georgia Kraft filed a Motion to Compel Arbitration, raising for the first time the Federal Arbitration Act (R-532-534). 9 U.S.C. Section 1, et seq. Georgia Kraft also sought a stay of the civil action relying upon 9 U.S.C. Section 3. The Rhodes have steadfastly argued since the Federal Arbitration Act was first raised by Inland-Rome on October 26, 1988, more than two years after the inception of this litigation, that the Federal Arbitration Act did not apply. The Arbitration Act was not raised until subsequent to the order of the Superior Court of Greene County declaring that the Rhodes had effectively terminated the agreement and that there no longer existed any right of arbitration under the timber purchase agreement. The Georgia Supreme Court reviewed that decision and on October 7, 1987, issued its opinion agreeing that the arbitration provision did not control. *Id.* at 472, 360 S.E.2d at 598. Georgia Kraft did not seek any further review of that decision, deciding instead to continue with this litigation, conducting discovery and filing a motion for summary judgment which was denied.[4]

---

[4] In addition to other arguments made in the trial court and the Georgia Court of Appeals, the Rhodes contended that

(Continued on following page)

Petitioner seeks a review by this Court of the sufficiency of the evidence to establish interstate commerce so as to invoke the provisions of the Federal Arbitration Act. The decision of the Georgia Court of Appeals finding that there was no evidence to authorize a finding of the applicability of the Federal Arbitration Act does not conflict with decisions of this Court or of the United States Courts of Appeal, and therefore the Writ of Certiorari should be denied.[5]

SUMMARY OF ARGUMENT

The Georgia Court of Appeals correctly applied Federal law in deciding that the contract did not evidence a transaction involving interstate commerce. Petitioner merely disputes the finding of that Court based upon the

---

(Continued from previous page)

Georgia Kraft Company had waived its right to arbitration by actively pursuing discovery and litigating in the trial court for over two years prior to raising the Arbitration Act. The Court of Appeals, finding that the Arbitration Act was inapplicable, did not reach this issue.

[5] The Supreme Court of Georgia has accepted the Rhodes' petition for certiorari to review Division 4 of the opinion of the Georgia Court of Appeals, which affirmed the trial court's denial of summary judgment as to Georgia Kraft Company's counterclaims against the Rhodes. Georgia Kraft Company has never sought to have its counterclaims arbitrated. Oral argument in the Supreme Court on same is scheduled for September 5, 1990.

evidence that the Federal Arbitration Act was not applicable. Also, 9 U.S.C. Section 15 does not preempt Georgia's procedural rules and policy for interlocutory appeals of orders compelling arbitration.

ARGUMENT

I. THE CONTRACT DID NOT INVOLVE INTERSTATE COMMERCE.

The Federal Arbitration Act, 9 U.S.C. Section 1, et seq., applies in only two kinds of contracts, i. e., those in admiralty and those "evidencing a transaction involving commerce." 9 U.S.C. Section 2. Thus, the initial inquiry in any litigation concerning the application of the Arbitration Act is whether such a contract is involved. See *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967).

Although Section 2 of the FAA has been declared to apply in state courts, this Court has recognized that the reach of the Arbitration Act would be limited to transactions involving interstate commerce and that the requirement contained in Section 2 of "involving commerce" was to be viewed "as a necessary qualification on a statute intended to apply in State and Federal Courts." *Southland Corporation v. Keating*, 465 U.S. 1, 13, 104 S.Ct. 852, 860 (1984). If it is determined that the Arbitration Act is applicable, the result is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint, supra*, at 404, n. 12, 87 S.Ct. at 1806, n. 12; *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248 (1989).

Thus, in order for the Arbitration Act to be applicable to this controversy, Petitioner had to show that the contract in question evidenced a transaction involving interstate commerce. The record in this case does not support such a finding, and the Georgia Court of Appeals correctly held that the Arbitration Act was, therefore, not applicable.

In determining whether or not this contract evidenced a transaction involving interstate commerce, the Georgia Court of Appeals correctly noted that the contract itself did not relate to the interstate shipment of any product, but related solely to the sale of standing timber located exclusively in Georgia. The Georgia Court of Appeals further noted that the evidence submitted by Petitioner showed only its "unilateral involvement in interstate commerce occurring only after its performance under the contract with [Respondents] has long since been completed." *Rhodes v. Inland-Rome, Inc.*, 195 Ga. App. 39, 40, 392 S.E.2d 270, 271.

Georgia Courts have consistently recognized the preemption of the Arbitration Act in transactions involving interstate commerce. For instance, in *ADC Construction Company v. McDaniel Grading, Inc.*, 177 Ga. App. 223, 338 S.E.2d 733 (1985), the Georgia Court of Appeals recognized that where transactions out of which the claim for arbitration arose involve interstate commerce within the meaning of the Arbitration Act, state law and policy must yield to federal law, and that the determination of whether a contract evidences transactions in interstate commerce is a question on which federal rules of contract construction and interpretation govern. *Id.* at 224, 338

S.E.2d at 735. Thus, the Georgia Court of Appeals in that case stated that:

> [a]lthough this construction was to be performed in Georgia and the general and subcontractor were both from Georgia, where the contractor uses employees from another state, and material incorporated into the construction is purchased in another state, and some of the subcontractors are from another state, these facts are sufficient to support a finding of the trial court that this contract involved "commerce" as that term is used in the Federal Arbitration Act.

Id. at 225, 338 S.E.2d at 736.

Likewise, in *Hilton Construction Company v. Barton Mechanical Contractors, Inc.*, 251 Ga. 701, 308 S.E.2d 830 (1983), the Georgia Supreme Court recognized that the Arbitration Act created a body of federal substantive law, to which state law and policy must yield where the transaction involved interstate commerce. *Id.* at 703, 308 S.E.2d at 832. See also *West Point-Pepperell, Inc. v. Multi-Line Industries, Inc.*, 231 Ga. 329, 201 S.E.2d 452 (1973); *Paine, Webber, Jackson & Curtis, Inc. v. McNeal*, 143 Ga. App. 579, 239 S.E.2d 401 (1977).

In *McCormick-Morgan, Inc. v. Whitehead Electric Company*, 179 Ga. App. 10, 345 S.E.2d 53 (1986), the Georgia Court of Appeals again affirmed the decision by the trial court that interstate commerce was involved and the Arbitration Act applied. The Court noted that:

> [w]here one contractor is not from Georgia and the contract is to be performed in Georgia, and material incorporated in the contract work is from out of state, as in the instant case, the

> contract is one involving interstate commerce within the meaning of 9 U.S.C. Section 1.

Id. at 12, 345 S.E.2d at 55.

With this background, the Georgia Court of Appeals in reviewing this contract noted that it related solely to the sale of standing timber located exclusively in Georgia, that it did not involve the interstate shipment of any product, and contrasted the facts of this case with those presented in *Brockett Pointe Shopping Center, Ltd. v. Development Contractors, Inc.*, 193 Ga. App. 854, 389 S.E.2d 374 (1989). The facts in *Brockett Pointe Shopping Center, Ltd.* showed undisputed evidence that out-of-state goods, services, materials and financing were supplied during execution of the construction contract, thereby showing that the transaction involved interstate commerce as contemplated by the Arbitration Act. *Id.* at 856, 389 S.E.2d at 375.

The test for determining whether or not a contract evidences a transaction involving interstate commerce has been stated in *Metro Industrial Painting Corp. v. Terminal Construction Co., Inc.*, 287 F.2d 382, at 387 (2nd Cir. 1961) (Lumbard, C.J., concurring), *cert. denied*, 368 U.S. 817, 82 S.Ct. 31 (1961), as follows:

> The significant question, therefore, is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, . . . In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated.

This standard has been applied by state courts to determine whether or not a contract involves interstate commerce so as to apply the Arbitration Act. In *Ex Parte Warren*, 548 So.2d 157 (Ala. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 554 (1989); *Ex Parte Williams*, 555 So.2d 146 (Ala. 1989); *Burke County Public Schools v. Shaver*, 303 N.C. 408, 279 S.E.2d 816 (1981).

In *Ex Parte Warren, supra*, a suit was filed alleging breach of contract and breach of warranties pursuant to the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, 15 U.S.C. Section 2301-12. The sales contract contained an arbitration clause specifically stating that the motor vehicle described had theretofore been traveling in interstate commerce and "has an impact upon interstate commerce." The contract further made specific reference to the Federal Arbitration Act, and the parties agreed to submit any dispute under the terms of the contract of sale to arbitration under the Arbitration Act. However, the facts showed that the plaintiffs were residents of Alabama; the defendant corporation, although a Delaware corporation, had its sole and principal place of business in Alabama; that the sale of the vehicle occurred within the State of Alabama; that the contract was entered into and executed in the State of Alabama; and that all obligations anticipated from the sales contract were to be performed solely within the State of Alabama. 548 So.2d at 159. Based upon the stipulated facts, the Alabama Supreme Court determined that the transaction did not involve interstate commerce as contemplated by the Arbitration Act.

In the instant action, the Rhodes are residents of Georgia; Georgia Kraft, although a Delaware corporation,

had its principal place of business in Georgia; the sale of the timber which is the subject of the contract occurred within Georgia; all of the land under the contract and related lease agreement was in Georgia; the contract for the sale of the timber was entered into and executed in the State of Georgia and provided that it was to be governed by the laws of the State of Georgia; and all obligations anticipated under the contract were to be performed solely within the State of Georgia. Thus, clearly at the time the Rhodes and Georgia Kraft entered into the contract containing the limited arbitration clause,[6] substantial interstate activity was not contemplated. The Federal Arbitration Act was not referenced in the contract. It was acknowledged that Georgia law would apply to the contract. Further, the contract is between individual sellers and a corporate purchaser located within Georgia, rather than a transaction between merchants of different states.[7]

---

[6] Not all disputes were to be arbitrated under the terms of the contract. Although Petitioner has argued subsequent to raising the Arbitration Act that the issue of whether the change from stick scaling or volumetric method to a weight scaling method of measuring cords breached the contract is to be determined by arbitration, it had previously recognized that "[w]hether or not we used a weight factor instead of stick scaling, that's been resolved. The Supreme Court [*Georgia Kraft Company v. Rhodes, supra*] has ruled that that breached the contract." (Transcript, May 24, 1988, p. 27).

[7] Although as Justice Harlan stated in dissent in *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, ___, 87 S.Ct. 1801, 1809 (1967), that the legislative history indicates the Arbitration Act "was to have a limited application to

(Continued on following page)

Petitioner quotes one factor applied by the Georgia Court of Appeals, i.e., that "the contract . . . does not itself relate to the interstate shipment of any product," arguing that Georgia courts require interstate shipment of goods to justify a finding of "commerce" within the meaning of the Arbitration Act. As previously noted, Georgia has not so construed the Arbitration Act. See *e.g.*, *ADC Construction Company v. McDaniel Grading, Inc.*, *supra*, (Arbitration Act applies where employees are from another state, material purchased in another state, and some contractors from another state); *McCormick-Morgan, Inc. v. Whitehead Electric Company*, *supra*, (Arbitration Act applies where material incorporated in contract work is from another state); *Paine, Webber, Jackson & Curtis, Inc. v. McNeal*, *supra*, (Arbitration Act applies involving purchase and sale of securities in national exchanges). Further, the opinion of the Georgia Court of Appeals cannot fairly be read to require interstate shipment of a product. As that Court noted, the contract "relates solely to the sale of standing timber located exclusively in Georgia" and that Georgia Kraft Company's "own unilateral involvement in interstate commerce [occurs] only after its performance under the contract with [Respondents] has long since been completed." *Rhodes v. Inland-Rome*, *id.* at 40, 392 S.E.2d at 271.

Georgia Kraft Company apparently did not view the Federal Arbitration Act to be applicable to this controversy since it failed to raise the Federal Arbitration Act

---

(Continued from previous page)

contracts between merchants for the interstate shipment of goods," neither this Court nor the courts of Georgia have so limited the application of the Arbitration Act.

for over two years after this litigation had begun. Georgia Kraft Company had also taken the position in Federal Court that its activities were confined to the State of Georgia, rather than being multi-state, in arguing that the Federal action initiated based upon diversity should be dismissed.

This Court should not review by writ of certiorari the ruling by the Georgia Court of Appeals finding under the facts of this case that the contract did not evidence a transaction involving interstate commerce. The Georgia Supreme Court declined to review this issue by writ of certiorari. As evidenced by the argument presented herein, Georgia courts have consistently applied the Federal Arbitration Act in situations involving interstate commerce, and this decision of the Court of Appeals is consistent not only with the prior decisions of the Georgia Supreme Court and Court of Appeals, but is not in conflict with decisions of this Court or of the United States Courts of Appeal.

II. GEORGIA'S INTERLOCUTORY APPEAL STATUTE IS NOT PREEMPTED BY 9 U.S.C. SECTION 15.

Petitioner further seeks to have this Court expand the application of the Federal Arbitration Act beyond that currently authorized by this Court. For instance, as previously noted, this Court has not held that Sections 3 and 4 of the Arbitration Act are applicable to state court proceedings. *Volt Information Sciences v. Board of Trustees, supra* at ___ n. 6, 109 S.Ct. at 1254, n. 6. Petitioner seeks to

apply not only Section 2 to this intra-state transaction, but also Sections 3, 4, and 15 of the Act.

As noted in the objection to jurisdiction herein, Georgia Kraft Company did not cross-appeal from the trial court's order certifying its decision for immediate review and did not seek a review by the Supreme Court of Georgia of the decision granting the interlocutory appeal. Therefore, it did not preserve that ground after objecting to the application for interlocutory appeal filed by the Rhodes. Further, in the trial court, Georgia Kraft Company took a position contrary to that argued before this Court and did not argue to the trial court that Section 15 should be applied to preclude the certification for interlocutory appeal. At the hearing held in this matter on December 6, 1988, which was prior to the effective date of Section 15, counsel for Georgia Kraft stated:

> Finally, I make a practical observation, Your Honor, and that is that the Georgia Supreme Court has held in *Phillips Construction Company v. Cowart Iron Works*, [250 Ga. 488, 299 S.E.2d 538], a 1983 opinion, that in any case in which a Motion Seeking To Compel Arbitration is denied that the trial court is urged by the Georgia Supreme Court to certify that issue for appeal.

The order of the trial Court was not entered until March 9, 1989, and the certificate for immediate review as provided under O.C.G.A. Section 5-6-34(b) was signed on the following day, all subsequent to the effective date of Section 15 on February 17, 1989. No cross-appeal was filed by Georgia Kraft from the order certifying its decision for immediate review; this was not urged as error in the Court of Appeals subsequent to the grant of the application for interlocutory appeal, and no review of

this interlocutory order was sought in the Supreme Court of Georgia. Therefore, it is respectfully submitted that this Court does not have jurisdiction to review same and further that the granting of the interlocutory appeal is now moot.

Also, since the contract in issue does not involve interstate commerce, it is unnecessary for this Court to reach the issue of the application of newly enacted Section 15 of the Arbitration Act.

Further, as this Court held in *Volt Information Sciences, Inc. v. Board of Trustees, supra* at ___, 109 S.Ct. at 1254:

> There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to insure the enforceability, according to their terms, of private agreements to arbitrate.

Volt Information Sciences, supra, also noted that the Arbitration Act does not reflect an intent to occupy the entire field of arbitration. Therefore, the California statute in issue in that case staying arbitration pending a resolution of related litigation was upheld as not being preempted by the Arbitration Act, when it was provided that the contract was to be governed by the law of California. In this case, the contract specifically provided that it was to "be construed according to the laws of the State of Georgia." Therefore, the Georgia policy as stated in *Phillips Construction Co. v. Cowart Iron Works, Inc.*, 250 Ga. 488, 299 S.E.2d 538 (1983), recommending that the trial courts, "except in the clearest cases," certify orders granting or denying stays of arbitration on the basis "that judicial economy favors interlocutory appeals in such cases" (*id.*

at 490, 299 S.E.2d at 540) is valid and does not contravene federal policy.

This Court has specifically held that the provisions of Section 4 of the Arbitration Act, to the extent that they require application of the Federal Rules of Civil Procedure, are not binding upon state courts. *Southland Corporation v. Keating, supra,* at ___, n. 10 104 S.Ct. at 861, n. 10. Thus, although this Court has required the application of the Federal Arbitration Act in state courts under the commerce clause, it has left the procedures for state court proceedings to the states so long as they do not conflict with the federal policy of enforcing the agreement to arbitrate.

This Court is being asked to give an advisory ruling concerning the procedural provisions of the Federal Arbitration Act. This case is not a proper case for such a ruling since Petitioner has not sought a judicial review by the Georgia Supreme Court and since the contract in issue does not involve interstate commerce.

CONCLUSION

For all the reasons stated herein, Respondents respectfully request that the Writ of Certiorari be denied.

Respectfully submitted,

THOMAS R. BURNSIDE, Jr.
(Counsel of Record)

JAMES B. WALL

BURNSIDE, WALL & DANIEL
Post Office Box 2125
Augusta, Georgia 30903
(404) 722-0768

KENNETH GOOLSBY
Post Office Box 981
Thomson, Georgia 30824
(404) 595-1220

Counsel for Respondents

APPENDIX

ORDER OF SUPERIOR COURT OF
GREENE COUNTY, GEORGIA
ENTERED DECEMBER 12, 1987

IN THE SUPERIOR COURT OF GREENE COUNTY,
STATE OF GEORGIA.

C. L. RHODES, JR., et al.,	:	CIVIL ACTION
Plaintiffs	:	NO. 86-CV-160
v.	:	
GEORGIA KRAFT COMPANY,	:	
Defendant	:	

ORDER

I. STATEMENT OF THE CASE

The above-styled case comes before this Court on Plaintiffs' Motion for a Preliminary Injunction and Declaratory Judgment. A hearing in this matter was held September 9, 1986, in the Superior Court of Greene County, Greensboro, Georgia, at which time the parties, through counsel, presented arguments to the Court. The Court subsequently took the matter under advisement.

On January 1, 1957, certain of the plaintiffs as "Sellers" and the defendant as "Purchaser" entered into a timber purchase contract. Those same parties also entered into a lease agreement on June 1, 1957, regarding property owned by the plaintiffs on which the timber was located.

On August 15, 1986, plaintiffs in the above-styled case filed their complaint alleging certain breaches of the

contract by the defendant and seeking temporary injunctive relief.

After a hearing on August 19, 1986, on the issue of temporary injunctive relief, the Court issued its order, dated August 20, 1986, in which it temporarily enjoined the defendant from cutting or removing pulpwood or timber from the subject property.

At the hearing on September 9, 1986, the defendant argued that the matters in dispute between the parties are subject to arbitration under the terms of the timber purchase contract. The plaintiffs countered that (1) the defendant by its conduct waived any rights it had, if any, to arbitration; (2) that the dispute involved does not come within the arbitration provisions of the contract; and, (3) that the timber purchase contract has been effectively terminated, thereby terminating any rights to arbitration.

II. FINDINGS OF FACT

The Court makes the following findings of fact.

The plaintiffs and defendant entered into a timber purchase agreement with plaintiffs as sellers and defendant as buyer January 1, 1957, for purchase and sale of timber on approximately 6400 acres of land which is the property of the plaintiffs. Plaintiffs and defendant entered into a certain lease agreement dated June 1, 1957, with plaintiffs as lessors and defendant as lessee for the same property described in the aforesaid timber purchase agreement. The term of said lease agreement runs concurrently with the term of the said timber purchase contract, and under its terms "shall automatically terminate and

expire upon any sooner termination of said timber purchase contract or of the effective period thereof."

Paragraph 2 and paragraph 13 of the aforesaid timber purchase agreement require the defendant to keep permanent, accurate and detailed books and records with respect to the cord credit account as the same is more particularly described in paragraph 2 of said timber purchase agreement. Entries to said cord credit account by the defendant are required based upon the number of "cords", as that term is defined in paragraph 6 of said timber purchase agreement, of pulpwood cut and removed from the subject lands of the plaintiffs.

Under the terms of paragraph 5 of said timber purchase agreement, entries are required to be made by the defendant to plaintiffs' cord credit account for each cord of hardwood pulpwood as the equivalent of one-half of one cord of pine pulpwood; for each 1,000 board feet of pine or poplar saw timber, pole or piling timber, cross tie timber, or veneer block timber (as measured by Scribner Decimal C Scale) as the equivalent of three cords of pine pulpwood; for each 1,000 board feet of hardwood saw timber, pole or piling timber, cross tie timber, or veneer block timber, other than poplar (as measured by Scribner Decimal C Scale), as the equivalent of two cords of pine pulpwood.

The terms of paragraph 5 also provide that "should any of said timber be utilized by purchaser in a manner which renders impossible or impractical the computation of the quantity of timber utilized by means of the conversion factors set forth in said paragraph that in such event an additional conversion factor or factors for determining

the equivalent of cords of pine pulpwood so utilized shall be fixed by mutual agreement between the parties" and that in the event the parties are unable to agree upon such additional factor or factors, the same were to be determined in accordance with paragraph 12 of said agreement.

The defendant has no records showing the way and manner in which the cord credit account entries were determined at any time prior to 1981. The defendant has no records of any Scribner Decimal C Scale measurements on timber removed by it from plaintiffs' lands which are the subject of said timber purchase contract, and the defendant has not made any Scribner Decimal C Scale measurements on timber cut and removed from said lands since some time in the early 1960's.

Since sometime in the early 1960's, the defendant has weighed pulpwood removed from said lands in lieu of measuring same on the basis of 128 cubic feet equalling one cord, and has weighed saw timber removed from said lands without using Scribner Decimal C Scale measurements and in each instance has estimated the number of cords based on defendant's estimated weight equivalent. Plaintiffs have never agreed for the defendant to use defendant's estimated weight equivalent in lieu of actual cord and Scribner Decimal C Scale measurements, nor has defendant sought any such agreement from the plaintiffs. There are no amendments or modifications to the existing timber purchase agreement of January 1, 1957. The defendant has no weight tickets indicating weight of pulpwood or saw timber cut and removed from plaintiffs' lands prior to 1981.

Plaintiffs, through their counsel, notified the defendant July 15, 1986 that they deemed defendant's failure to maintain permanent records as to the cord credit account reflecting the actual number of cords removed as provided under paragraph 2 of the timber purchase agreement and the making of entries to the cord credit account based on weight rather than actual volume cord measurements as provided in the timber purchase agreement, and the failure to use Scribner Decimal C Scale measurements as provided in paragraph 5 of the timber purchase agreement, all to constitute a breach and default under the terms of said timber purchase agreement.

By letter of July 25, 1986, the defendant advised counsel for plaintiffs that it believed the use of cord weight equivalent was reasonable and common in the industry. Defendant also sought to invoke the arbitration provisions of said timber purchase agreement with respect to the alleged breaches of said contract by it. On July 31, 1986, plaintiffs, acting through their counsel, notified the defendant that in view of its failure to cure the breaches alleged that said timber purchase agreement and the related lease agreement were terminated in accordance with the provisions of said timber purchase contract. The aforesaid timber purchase contract in paragraph 18 provides that should purchaser, Georgia Kraft Company (the defendant), default in its convenants, obligations, or liabilities under said agreement, and should said default continue and not be removed or corrected within a reasonable time after delivery of service of written notice thereof, sellers (plaintiffs herein) may, at their option, during the continuance of said default, terminate said agreement in its entirety.

III. CONCLUSIONS OF LAW

Based on the foregoing findings of fact, this Court concludes that the defendant has breached the timber purchase contract with plaintiffs. The plaintiffs have effectively terminated this agreement in its entirety in accordance with the provisions of paragraph 18 of said agreement. There no longer exists any right of arbitration under the timber purchase agreement, the same having been terminated by plaintiffs as a result of the breaches by defendant. Therefore, the defendant is properly before this Court, and venue and jurisdiction in this case are proper. The sole issues remaining for determination in this case are plaintiffs' claim for damages against the defendant and defendant's counterclaim for damages against plaintiffs.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the temporary restraining order entered by this Court on August 20, 1986, be, and the same is hereby, made permanent and defendant is permanently enjoined from hereafter exercising any rights or privileges of any kind or nature under said timber purchase contract or the related lease agreement.

SO ORDERED, this 8th day of December, 1986.

/s/ Joseph B. Duke
Joseph B. Duke
Judge, Superior Courts
Ocmulgee Judicial Circuit

OPINION OF SUPREME COURT OF GEORGIA DECIDED OCTOBER 7, 1987

In the Supreme Court of Georgia

Decided: OCT 7 1987

44406. GEORGIA KRAFT COMPANY v. RHODES, et al.

CLARKE, Presiding Justice.

This is an appeal from a permanent injunction entered against Georgia Kraft; the controlling issues are the construction to be given to the terms of a timber purchase contract (hereinafter Contract) and a lease agreement (hereinafter Lease) entered into between Georgia Kraft and the predecessors in title to the appellees (hereinafter the Rhodes). After two hearings the trial court concluded that Georgia Kraft had breached the Contract which allowed the Rhodes to exercise their right to terminate the agreements.

On January 1, 1957, the Rhodes as sellers entered into the Contract with Georgia Kraft for the purchase and sale of timber on 6400 acres of land; on June 1, 1957 they entered into the Lease of the same lands to run concurrently with the Contract and providing further that the Lease would terminate upon termination for any reason of the Contract.

The Contract provided that Georgia Kraft have the right to cut one cord of wood per acre per year and would pay the Rhodes the contract pricing for these cords whether or not they were cut in a given year. The Contract also establishes a "Cord Credit Account" and provides that when Georgia Kraft fails to harvest its one cord

per acre in a year then there will be an account balance entitling Georgia Kraft to cut unharvested trees which were paid for at any time during the duration of the Contract.

The Contract requires that Georgia Kraft maintain a permanent record on the cord credit account regarding the amounts cut and paid for under the contract. The Contract provides in paragraph 5 that the Scribner Decimal C Scale will be used in determining a cord by volume and sets forth conversion factors for determining entries into the cord credit account.

According to the Rhodes, they learned in April of 1986 that Georgia Kraft had abandoned the cord-volume measurement and had been using a weight measurement and then later learned that Georgia Kraft had not maintained a permanent record of the cord-credit account. After some communications between the parties the Rhodes notified Georgia Kraft that they considered the contract breached by Georgia Kraft. Georgia Kraft responded with a call for arbitration under a clause of the Contract.

The Rhodes then filed this action seeking to enjoin Georgia Kraft from cutting or removing timber under the contract and to declare the contract null and void. They also sought to enjoin any arbitration and to recover damages. Georgia Kraft denied any breach and contended that the Contract required the Rhodes to arbitrate. They also filed a counterclaim to recover the value of the wood paid for under the cord-credit account but not yet harvested. A hearing was held on August 19, 1986 on the Rhodes request for a temporary restraining order; both

sides were represented and the court granted the temporary relief and set an interlocutory hearing.

The second hearing took place on September 9, 1986; at the conclusion it was agreed that the August 19 order remain in effect until further order of the court. On December 8, 1986 the court entered an order concluding that Georgia Kraft had breached the Contract which gave the Rhodes the right to declare it voided. Under these circumstances the court held that the arbitration provision of the Contract did not apply and the sole remaining issues were the claims and counterclaim for damages. It was ordered that the temporary injunction be made permanent.

1. The appellants contend that the trial court erred in entering a permanent injunction after the interlocutory hearing because there was no order consolidating the issues as provided in OCGA §9-11-65(a)(2). The general rule is that entering permanent relief after an interlocutory hearing is improper. *Ward v. Process Control Corp.*, 247 Ga. 582 (277 SE2d 671) (1981); *Miller v. Wells*, 235 Ga. 411 (219 SE2d 729) (1975). However, when there is notice of an interlocutory injunction hearing, the court may determine the issues on their merits after the interlocutory hearing where there is no objection or where the parties have acquiesced. *Richmond County Hosp. Auth. v. Richmond County*, 255 Ga. 183 (4) (336 SE2d 562) (1985); *Wilkerson v. Chattahoochee Parks, Inc.*, 244 Ga. 472 (260 SE2d 867) (1979).

At the conclusion of the interlocutory hearing the trial court and counsel for each side discussed the issues then pending before the court. The court did inform

counsel that he might rule on whether the contract had been breached as a matter of law based upon the evidence before him. *Regency Club v. Stuckey,* 253 Ga. 583 (3) (324 SE2d 166) (1984). Under the circumstance we find no procedural error in the court entering a ruling on the merits of whether the contract was breached.

2. Appellants next contend that the court erred in ruling on the merits of whether the contract had been breached because there was insufficient evidence before the court, and erred in failing to enforce the arbitration clause. There was no witness testimony at the hearing. There were two affidavits in the record from the plaintiffs and the defendants had brought in documents in response to a motion to produce. The documents were discussed and a stipulation was made regarding which documents were kept up and in the possession of Georgia Kraft, although no stipulation was made as to the legal effect of those documents.

The stipulations and submissions of counsel were sufficient to allow the court to construe the Contract. The Contract provides that measurements be made by the Scribner Decimal C Scale and cubic feet. Sometime in the 1960s Georgia Kraft switched to measuring the wood taken by weight and with no reference to the Scribner Decimal C Scale. The Contract provides that if the method of measuring provided in the Contract is no longer possible or practical, then a new method shall be set by agreement of the parties. It also provides that if the parties are unable to agree then the method would be decided by paragraph 12 of the Contract regarding arbitration.

The arbitration clause in paragraph 12 provides for the selection of arbitrators if there is a dispute over forestry practices or the method to be used in determining payment under the contract.

The court also had before it the fact that the Contract provides that Georgia Kraft agreed to keep permanent and detailed accounts with respect to the cord-credit account. There was no agreement by the Rhodes when Georgia Kraft changed the method of calculating payment sometime in the 1960s. Georgia Kraft has no record of how the cord credit account entries were determined prior to 1981 and has no weight tickets reflecting the amount of timber harvested prior to 1981.

The Contract provides that if Georgia Kraft defaults under any of its obligation and the default is not corrected after notice from the Rhodes then the Rhodes may terminate the Contract.

The Rhodes gave written notice alleging default under the Contract on July 15, 1986 based upon the failure to maintain permanent records of the cord-credit account and the unilateral change of calculating the method of payment. Georgia Kraft responded by invoking the arbitration clause. The trial court concluded that Georgia Kraft had breached the Contract by failing to keep permanent records and in unilaterally changing payment computations with no notice to the sellers, the Rhodes. The construction, interpretation and legal effect of a contract is a question for the court to decide. *Honea v. Gilbert*, 236 Ga. 218 (223 SE2d 218) (1976); *Holt v. Clairmont Development Co., Inc.*, 222 Ga. 598 (151 SE2d 151) (1966).

Kraft argues that this is a dispute over method of payment and the payment calculation section states that this is an issue for arbitration. Rhodes points out that the Contract provides for arbitration of payment method when a change in the method is proposed and not when a unilateral change is made without notice. Rhodes also points out that the arbitration provision in this contract is not a prerequisite to suit on all issues. This action is based upon breach of the contract by failing to use the method of calculation as provided in the Contract and failing to follow the terms regarding a change in the method of calculation. We agree that the arbitration provision does not control. We note that Georgia law has historically authorized agreements to binding arbitration of existing disputes. OCGA § 9-9-1, et seq. However, it appears that the contractual imposition of the duty to arbitrate as an exclusive and binding remedy for disputes which arise in the future is limited to construction contracts. OCGA § 9-9-80, et seq.

The trial court has found a breach of the Contract and entered a permanent injunction respecting harvesting of trees. The issues of money claims for each side have been reserved for trial. The question of whether the money claims are subject to arbitration as a prerequisite to suit is not before the court at this time. Under the circumstances of this case the trial court did not err in interpreting the contract and in concluding that under its terms the breach by Georgia Kraft entitled the Rhodes to terminate the Contract.

Judgment affirmed. All the Justices concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

C. L. RHODES, JR., INDIVIDUALLY, AND IN HIS REPRESENTATIVE CAPACITY AS EXECUTOR OF THE ESTATE OF C. L. RHODES, DECEASED, AND IN HIS REPRESENTATIVE CAPACITY AS EXECUTOR OF THE ESTATE OF CLEO K. RHODES, DECEASED; JANE C. RHODES; SUSAN RHODES HARRIS; C.L. RHODES, III; AND BOYD C. RHODES,	:	CIVIL ACTION NO. CV 186-145
Plaintiffs,	:	
vs.	:	
GEORGIA KRAFT COMPANY,	:	
Defendant.	:	

AFFIDAVIT OF
F. J. REYNOLDS

GEORGIA, FLOYD COUNTY.

Personally appeared before the undersigned officer, duly authorized to administer oaths, F. J. REYNOLDS, who, being first duly sworn, deposes and states on oath as follows:

1.

My name is F. J. REYNOLDS. I am 50 years old and a resident of Floyd County, Georgia. I am an employee and officer of Georgia Kraft Company, a Delaware corporation. From and since July, 1980, I have served as an officer

of and as Controller of Georgia Kraft Company. From and since April 30, 1986, I have also served as Assistant Secretary of Georgia Kraft Company. My duties in these offices include:

(a) By authority of the Board of Directors, I am empowered to attest to signatures and acts of officers of Georgia Kraft Company;

(b) I am responsible for the day-to-day financial and administrative functions of Georgia Kraft Company, including accounting, cash management and insurance coordination; and

(c) I have custody of the corporate seal as well as copies of corporate documents including the Articles of Incorporation and minutes of the meetings of the Board of Directors.

As such, I have personal knowledge of the corporate organization and existence of Georgia Kraft Company, and I am competent to make this affidavit.

2.

Georgia Kraft Company is a Delaware corporation, incorporated June 7, 1951. Georgia Kraft Company maintains an agent in Delaware, but does not maintain a place of doing business in Delaware. Georgia Kraft Company qualified to do business in Georgia on June 25, 1951 and has, since that date, remained duly qualified to do business in Georgia. Georgia Kraft Company qualified to do business in Alabama on April 23, 1956 and has, since that date, remained duly qualified to do business in Alabama. The majority of Georgia Kraft Company's business is carried on in Georgia.

3.

At all times pertinent to the above-styled action (from and since July, 1980, when I became an officer of and Controller of Georgia Kraft Company and prior thereto), Georgia Kraft has maintained its principal office and place of business in Rome, Floyd County, Georgia. All corporate records, all income tax records, all company asset records and all corporate administrative and financial records are kept in corporate headquarters in Rome, Georgia. The Chief Executive Officer of Georgia Kraft Company who is in charge of all the company's manufacturing operations both in the State of Georgia and in the State of Alabama has his office in Corporate Headquarters in Rome, Georgia and resides at Rome, Georgia. Georgia Kraft Company's Vice President, Human Resources, who is in charge of all personnel matters both in the State of Georgia and in the State of Alabama has his office in Corporate Headquarters in Rome, Georgia and resides at Rome, Georgia. The company's Controller, the Affiant, has his office in Corporate Headquarters at Rome, Georgia and resides at Rome, Georgia.

4.

At all times pertinent to the above-styled action (from and since July, 1980, when I became an officer of and Controller of Georgia Kraft Company and prior thereto), Georgia Kraft Company has operated paper mills in Floyd County, Georgia, Bibb County, Georgia and Russell County, Alabama. (The Alabama mill has a production capacity of less then one-third of the combined

capacity of the Georgia mills). Further, at all times pertinent to the above-styled action (from and since July, 1980, when I became an officer of and Controller of Georgia Kraft Company and prior thereto), Georgia Kraft Company has operated sawmills in Floyd County, Georgia, Meriwether County, Georgia, and Russell County, Alabama (each having equal capacity), and a plywood sawmill in Morgan County, Georgia. A large majority of Georgia Kraft Company's employees are employed in the State of Georgia.

5.

Although Georgia Kraft Company's operations in Alabama are sometimes referred to as "Alabama Kraft Co., a Division of Georgia Kraft Co.", this is not and never has been a separate corporation. "Alabama Kraft Co." is not and never has been a corporation. "Alabama Kraft Company" is not and never has been a corporation. At all times pertinent to the above-styled action (from and since July, 1980, when I became an officer of and Controller of Georgia Kraft Company and prior thereto), Georgia Kraft Company has used, and continues to use, "Alabama Kraft Company" simply as a trade name. All corporate activities in Alabama report to Corporate Headquarters in Rome, Georgia. All payroll checks for Alabama employees as well as all bills incurred in Alabama operations including payments for wood purchased in Alabama are paid with checks drawn from corporate headquarters in Rome, Georgia.

6.

I make this Affidavit of my own personal knowledge with the intent that it be used for any and all purposes in the case above-styled.

This 7th day of August, 1986.

Sworn to and subscribed before me this 7th day of August, 1986.

/s/ Bettie S. Daniel
NOTARY PUBLIC,
STATE OF GEORGIA

/s/ F. J. Reynolds
F. J. REYNOLDS

My commission expires MY COMMISSION EXPIRES SEPT. 22, 1989